

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 11, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANGELIQUE S.,¹

Plaintiff,

v.

ANDREW M. SAUL, the Commissioner
of Social Security,

Defendant.

No. 4:20-CV-5096-EFS

**ORDER DENYING PLAINTIFF'S
SUMMARY-JUDGMENT MOTION
AND GRANTING DEFENDANT'S
SUMMARY-JUDGMENT MOTION**

Before the Court are the parties' cross summary-judgment motions.²

Plaintiff Angelique S. appeals the denial of benefits by the Administrative Law Judge (ALJ). She alleges the ALJ erred by 1) improperly considering certain medical opinions, 2) improperly determining her impairments did not meet or equal a listed impairment, and 3) improperly determining step five of the

¹ To protect the privacy of the social-security Plaintiff, the Court refers to her by first name and last initial or as "Plaintiff." *See* LCivR 5.2(c).

² ECF Nos. 16 & 17.

1 sequential disability evaluation based on an incomplete hypothetical question. In
2 contrast, Defendant Commissioner of Social Security asks the Court to affirm the
3 ALJ's decision finding Plaintiff not disabled. After reviewing the record and
4 relevant authority, the Court denies Plaintiff's Motion for Summary Judgment,
5 ECF No. 16, and grants the Commissioner's Motion for Summary Judgment, ECF
6 No. 17.

7 I. Five-Step Disability Determination

8 A five-step sequential evaluation process is used to determine whether an
9 adult claimant is disabled.³ Step one assesses whether the claimant is currently
10 engaged in substantial gainful activity.⁴ If the claimant is engaged in substantial
11 gainful activity, benefits are denied.⁵ If not, the disability evaluation proceeds to
12 step two.⁶

13 Step two assesses whether the claimant has a medically severe impairment,
14 or combination of impairments, which significantly limits the claimant's physical
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19 ³ 20 C.F.R. §§ 404.1520(a), 416.920(a).

20 ⁴ *Id.* §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

21 ⁵ *Id.* §§ 404.1520(b), 416.920(b).

22 ⁶ §§ 404.1520(b), 416.920(b).

1 or mental ability to do basic work activities.⁷ If the claimant does not, benefits are
2 denied.⁸ If the claimant does, the disability evaluation proceeds to step three.⁹

3 Step three compares the claimant's impairment or impairments to several
4 recognized by the Commissioner as so severe as to preclude substantial gainful
5 activity.¹⁰ If an impairment or combination of impairments meets or equals one of
6 the listed impairments, the claimant is conclusively presumed to be disabled.¹¹ If
7 an impairment or combination of impairments does not meet or equal a listed
8 impairment, the disability evaluation proceeds to step four.

9 Step four assesses whether an impairment prevents the claimant from
10 performing work she performed in the past by determining the claimant's residual
11 functional capacity (RFC).¹² If the claimant can perform prior work, benefits are
12 denied.¹³ If the claimant cannot perform prior work, the disability evaluation
13 proceeds to step five.
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16 ⁷ *Id.* §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

17 ⁸ *Id.* §§ 404.1520(c), 416.920(c).

18 ⁹ §§ 404.1520(c), 416.920(c).

19 ¹⁰ *Id.* §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

20 ¹¹ *Id.* §§ 404.1520(d), 416.920(d).

21 ¹² *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

22 ¹³ §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
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1 Step five, the final step, assesses whether the claimant can perform other
 2 substantial gainful work—work that exists in significant numbers in the national
 3 economy—considering the claimant’s RFC, age, education, and work experience.¹⁴
 4 If so, benefits are denied. If not, benefits are granted.¹⁵

5 The claimant has the initial burden of establishing she is entitled to
 6 disability benefits under steps one through four.¹⁶ At step five, the burden shifts to
 7 the Commissioner to show the claimant is not entitled to benefits.¹⁷

8 II. Factual and Procedural Summary

9 Plaintiff filed Title II and Title XVI applications, at first alleging a disability
 10 onset date of December 2, 2014.¹⁸ Her claim was denied initially and upon
 11 reconsideration.¹⁹ An administrative hearing was held by video before
 12 Administrative Law Judge Marie Palachuk.²⁰ At the video hearing, Plaintiff
 13 amended her alleged disability onset date to May 1, 2016.

15 ¹⁴ *Id.* §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98
 16 (9th Cir. 1984).

17 ¹⁵ 20 C.F.R. §§ 404.1520(g), 416.920(g).

18 ¹⁶ *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

19 ¹⁷ *Id.*

20 ¹⁸ AR 252-53, 259-62.

21 ¹⁹ AR 174-80, 181-87.

22 ²⁰ AR 43-79.

1 In denying Plaintiff's disability claims, the ALJ made the following findings:

- 2 • Plaintiff met the insured status requirements through June 30, 2019.
- 3 • Step one: Plaintiff had not engaged in substantial gainful activity
- 4 since May 1, 2016, the amended alleged onset date.
- 5 • Step two: Plaintiff had the following medically determinable severe
- 6 impairments: obesity, with a Body Mass Index of 36; migraines;
- 7 chronic pain syndrome versus fibromyalgia; asthma with ongoing
- 8 smoking; depressive disorder; anxiety disorder; and personality
- 9 disorder.
- 10 • Step three: Plaintiff did not have an impairment or combination of
- 11 impairments that met or medically equaled the severity of one of the
- 12 listed impairments.
- 13 • RFC: Plaintiff had the RFC to:
- 14 perform light work as defined in 20 CFR 404.1567(b) and
- 15 416.967(b) except she can perform postural occasionally,
- 16 except she cannot climb ladders, ropes, or scaffolds and
- 17 no crawling; she should avoid all exposure to hazards;
- 18 she cannot have concentrated exposure to respiratory
- 19 irritants; from a psychological perspective, the claimant
- 20 is capable of understanding, remembering and carrying
- 21 out simple repetitive tasks and instructions; she can
- 22 maintain concentration, persistence, and pace for two-
- 23 hour intervals with regularly scheduled breaks; she is
- able to make simple judgment or decision-making; she
- can have brief interaction with the public, meaning that
- she can be in the vicinity or presence of the public, but no
- one-on-one interaction or collaboration; and she can have
- superficial interaction with coworkers, being defined as
- no collaborative tasks, no teamwork.
- Step four: Plaintiff was not capable of performing past relevant work.

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- Step five: considering Plaintiff's RFC, age, education, and work history, Plaintiff could perform work that existed in significant numbers in the national economy, such as cafeteria attendant; tagger/ticketer; and collator operator.²¹

5 When assessing the medical-opinion evidence, the ALJ gave:

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- great weight to the reviewing opinions of Robert Smiley, M.D. (except for Dr. Smiley's opinion that two absences a month for Plaintiff would be reasonable, which the ALJ assigned little weight), Nancy Winfrey, Ph.D., Lisa Ho, M.D., John Gilbert, Ph.D., and Patricia Kraft, Ph.D.;
 - partial weight to the examining opinions of Lindsey Ruppel, D.O., and Amy Dowell, M.D.;
 - and little weight to the examining opinions of N.K. Marks, Ph.D., John Fackenthall, D.O., Pavel Blagov, Ph.D., as well as the treating opinion of Josue Reyes, ARNP.²²

15 The ALJ determined the examining opinions of Dr. Fackenthall and Dr. Blagov
16 were too remote in time to be of significant evidentiary value.²³

17 The ALJ also found Plaintiff's medically determinable impairments could
18 reasonably be expected to cause some of the alleged symptoms, but her statements
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20 ²¹ AR 17-27.

21 ²² AR 23-25.

22 ²³ AR 25.

1 concerning the intensity, persistence, and limiting effects of those symptoms were
2 not entirely consistent with the medical evidence and other evidence in the
3 record.²⁴ Likewise, the ALJ discounted the lay statements from Plaintiff's
4 mother.²⁵

5 Plaintiff requested review of the ALJ's decision by the Appeals Council,
6 which denied review.²⁶ Plaintiff timely appealed to this Court.

7 III. Standard of Review

8 A district court's review of the Commissioner's final decision is limited.²⁷ The
9 Commissioner's decision is set aside "only if it is not supported by substantial
10 evidence or is based on legal error."²⁸ Substantial evidence is "more than a mere
11 scintilla but less than a preponderance; it is such relevant evidence as a reasonable
12 mind might accept as adequate to support a conclusion."²⁹ Moreover, because it is
13 the role of the ALJ and not the Court to weigh conflicting evidence, the Court
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17 ²⁴ AR 21.

18 ²⁵ AR 25.

19 ²⁶ AR 1-6.

20 ²⁷ 42 U.S.C. § 405(g).

21 ²⁸ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

22 ²⁹ *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).
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upholds the ALJ's findings "if they are supported by inferences reasonably drawn from the record."³⁰ The Court considers the entire record.³¹

Further, the Court may not reverse an ALJ decision due to a harmless error.³² An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination."³³ The party appealing the ALJ's decision generally bears the burden of establishing harm.³⁴

IV. Analysis

A. Medical Opinions: Plaintiff fails to establish error.

Plaintiff challenges the ALJ's assignment of little weight to the opinion of Dr. N.K. Marks. She also challenges the assignment of little weight to Dr. Smiley's opinion that two absences a month would be reasonable for Plaintiff. She further

³⁰ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

³¹ *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must consider the entire record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion," not simply the evidence cited by the ALJ or the parties) (cleaned up); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) ("An ALJ's failure to cite specific evidence does not indicate that such evidence was not considered[.]").

³² *Molina*, 674 F.3d at 1111.

³³ *Id.* at 1115 (cleaned up).

³⁴ *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

1 challenges the ALJ's assessment of the opinions of Dr. Dowell and Dr. Kraft. As
2 discussed below, Plaintiff fails to establish the ALJ's weighing of the medical-
3 opinion evidence was erroneous.

4 1. Standard for Claims Filed Before March 27, 2017

5 The weighing of medical opinions depends on the nature of the medical
6 relationship, i.e., whether the medical provider is 1) a treating physician, 2) an
7 examining physician who examined but did not treat the claimant, or 3) a
8 reviewing physician who neither treated nor examined the claimant.³⁵ Generally,
9 more weight is given to the opinion of a treating physician than to an examining
10 physician's opinion, and both treating and examining opinions are given more
11 weight than the opinion of a reviewing physician.³⁶

12 When a treating physician's or examining physician's opinion is not
13 contradicted by another physician's opinion, it may be rejected only for "clear and
14 convincing" reasons and, when it is contradicted, it may be rejected for "specific
15 and legitimate reasons" supported by substantial evidence.³⁷ A reviewing
16 physician's opinion may be rejected for specific and legitimate reasons supported by
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20 ³⁵ *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

21 ³⁶ *Id.*; *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

22 ³⁷ *Lester*, 81 F.3d at 830.

1 substantial evidence, and the opinion of an “other” medical source³⁸ may be
2 rejected for specific and germane reasons supported by substantial evidence.³⁹ The
3 opinion of a reviewing physician serves as substantial evidence if it is supported by
4 other independent evidence in the record.⁴⁰

5 2. Dr. Dowell

6 On May 20, 2017, Dr. Dowell performed a psychiatric evaluation of
7 Plaintiff.⁴¹ Dr. Dowell diagnosed Plaintiff with moderate recurrent Major
8 Depressive Disorder and Generalized Anxiety Disorder and stated that both
9 conditions were treatable with a good likelihood of recovery. Dr. Dowell stated that
10 “with optimal treatment” Plaintiff would see improvement in both disorders within
11 12 months. As part of her evaluation, Dr. Dowell performed a mental status
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14 ³⁸ See 20 C.F.R. § 404.1502 (For claims filed before March 27, 2017, acceptable
15 medical sources are licensed physicians, licensed or certified psychologists, licensed
16 optometrists, licensed podiatrists, qualified speech-language pathologists, licensed
17 audiologists, licensed advanced practice registered nurses, and licensed physician
18 assistants within their scope of practice—all other medical providers are “other”
19 medical sources.).

20 ³⁹ *Molina*, 674 F.3d at 1111; *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

21 ⁴⁰ *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

22 ⁴¹ AR 539-544.
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1 examination.⁴² Based on that examination, Dr. Dowell noted that Plaintiff
2 exhibited some “mild difficulties with memory and calculations, but otherwise
3 appeared fairly high functioning cognitively.”⁴³ Dr. Dowell opined that Plaintiff
4 “would not have difficulty” in the following activities: performing simple and
5 repetitive tasks or detailed and complex tasks; accepting instructions from
6 supervisors or interacting with coworkers and the public; performing work
7 activities on a consistent basis; and maintaining regular attendance in the
8 workplace or completing a normal workday/work week without interruptions from
9 a psychiatric condition.⁴⁴ Dr. Dowell opined that Plaintiff would have difficulty
10 dealing with the usual stress encountered in the workplace due to her anxiety.⁴⁵

11 The ALJ stated that she gave “some weight” to Dr. Dowell’s opinion but gave
12 “greater weight to the opinions of Dr. Winfrey, Dr. Gilbert, and Dr. Kraft, in order
13 to give the claimant every benefit.”⁴⁶ Plaintiff argues the ALJ committed legal
14 error by failing to address Dr. Dowell’s finding that Plaintiff would have difficulty
15 dealing with the usual stress of the workplace. Plaintiff is correct to the extent she
16 notes the ALJ did not expressly discuss Dr. Dowell’s opinion that Plaintiff would
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18 ⁴² AR 542-43.

19 ⁴³ AR 542-43.

20 ⁴⁴ AR 544.

21 ⁴⁵ AR 544.

22 ⁴⁶ AR 24.

1 have difficulty dealing with the usual stress of the workplace—although the ALJ
2 acknowledged this opinion,⁴⁷ she did not explain how it factored into her decision.

3 Plaintiff, however, cannot establish error in this regard because, by crafting
4 an RFC that limits Plaintiff's workplace stress, the ALJ rationally incorporated
5 Dr. Dowell's opinion into the disability determination.⁴⁸ The ALJ restricted
6 Plaintiff to the following: simple repetitive tasks and instructions; simple judgment
7 or decision-making; brief interaction with the public, meaning she can be in the
8 presence of the public but no one-on-one interaction or collaboration; and
9 superficial interaction with coworkers, meaning no teamwork or collaboration. As
10 the ALJ noted, these limitations exceed those found by Dr. Dowell. For example,
11 Dr. Dowell opined that Plaintiff could perform detailed and complex tasks and
12 could interact with coworkers and the public without limitation. By restricting
13 Plaintiff's RFC and limiting Plaintiff to simple tasks and minimal interaction with
14 coworkers and the public, the ALJ adequately incorporated Dr. Dowell's finding
15 that Plaintiff would have difficulty handling the "usual stress" encountered in the
16 workplace.

21 ⁴⁷ AR 23.

22 ⁴⁸ See *Rounds v. Comm'r of Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015).

1 3. Dr. Marks

2 On June 2, 2017, Dr. Marks performed a psychological evaluation of Plaintiff
3 on behalf of the Washington State Department of Social and Health Services.⁴⁹
4 Dr. Marks diagnosed Plaintiff with unspecified anxiety disorder, unspecified
5 depressive disorder, and unspecified personality disorder.⁵⁰ Based on the Beck
6 Depression Inventory and Beck Anxiety Inventory, Dr. Marks noted that Plaintiff's
7 depression and anxiety were in the severe range.⁵¹ However, Plaintiff's Personality
8 Assessment Inventory results "were inconclusive as [Plaintiff] endorsed too many
9 symptoms."⁵² Dr. Marks noted that, "Her results suggest that she was attempting
10 to present herself in a negative manner."⁵³

11 Dr. Marks also performed a mental status exam. She found Plaintiff's speech
12 was minimal, well-organized, and progressive.⁵⁴ She also found Plaintiff's attitude
13 and behavior to be cooperative, verbal, open, and with good eye contact.⁵⁵ She
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16 ⁴⁹ AR 23.

17 ⁵⁰ AR 549.

18 ⁵¹ AR 549.

19 ⁵² AR 549.

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21 ⁵⁴ AR 551.

22 ⁵⁵ AR 551.

1 found Plaintiff to have a depressed and anxious mood with flat affect.⁵⁶ Dr. Marks
2 concluded that the following were within normal limits: Plaintiff's thought process
3 and content, orientation, perception, memory, concentration, abstract thought, and
4 insight and judgment.⁵⁷ Dr. Marks' concluded that only Plaintiff's fund of
5 knowledge was not within normal limits.⁵⁸

6 Dr. Marks indicated that Plaintiff was moderately limited in the following:
7 understanding, remembering, and persisting in tasks by following short and simple
8 instructions; and performing routine tasks without special supervision. Dr. Marks
9 concluded Plaintiff was markedly limited in the following activities: understanding,
10 remembering, and persisting in tasks by following detailed instructions;
11 performing activities within a schedule, maintaining regular attendance, and being
12 punctual within customary tolerances without special supervision; learning new
13 tasks; adapting to changes in a routine work setting; making simple work-related
14 decisions; asking simple questions or requesting assistance; maintaining
15 appropriate behavior in a work setting; and completing a normal work day and
16 work week without interruptions from psychologically based symptoms.⁵⁹

17 Dr. Marks found Plaintiff was severely limited in her ability to perceive normal
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19 ⁵⁶ AR 551.

20 ⁵⁷ AR 552.

21 ⁵⁸ AR 552.

22 ⁵⁹ AR 550.

1 hazards and take appropriate precautions; communicating and performing
2 effectively in a work setting; and setting realistic goals and planning
3 independently.⁶⁰

4 The ALJ discounted Dr. Marks's testimony because 1) Dr. Marks's opinion
5 was inconsistent with the results of the mental status exam, 2) her opinion
6 appeared to be based exclusively on Plaintiff's self-reports, and 3) Dr. Marks
7 offered limitations significantly greater than those offered by Dr. Dowell, despite
8 that Dr. Marks had evaluated Plaintiff only a few weeks after Dr. Dowell.⁶¹

9 Dr. Winfrey and Dr. Kraft, both reviewing psychologists, contradicted
10 Dr. Marks's opinion. For example, Dr. Kraft concluded Plaintiff was not
11 significantly limited in her ability to carry out simple and detailed instructions;
12 was not significantly limited in her ability to perform activities within a schedule
13 and maintain regular attendance; could ask for help; could make simple work-
14 related decisions; could respond to changes in a work setting; could respond to
15 hazards; and could appropriately handle criticism.⁶²

16 Because Dr. Marks's examining opinion is contradicted, her opined
17 limitations can be rejected by the ALJ for "specific and legitimate reasons"
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21 ⁶⁰ AR 550.

22 ⁶¹ AR 24.

23 ⁶² AR 142-43.

1 supported by substantial evidence.⁶³ Internal inconsistency in Dr. Marks's
2 evaluation, i.e., between Dr. Marks's mental status evaluation and her opinion, is a
3 specific and legitimate reason to reject her opinion.⁶⁴ Plaintiff claims the ALJ did
4 not actually identify any inconsistencies, but various inconsistencies are readily
5 apparent. For example, Dr. Marks concluded Plaintiff would have moderate
6 difficulty understanding and remembering short and simple instructions despite
7 finding that Plaintiff's memory and perception were within normal limits.
8 Likewise, Dr. Marks found Plaintiff was markedly limited in learning new tasks.
9 However, this directly contradicts Dr. Marks' express notation that "No significant
10 learning problems were noted and she should be able to handle most entry level
11 jobs insofar as learning them."⁶⁵ Dr. Marks also found Plaintiff was markedly
12 limited in making simple, work-related decisions. This directly contradicts
13 Dr. Marks's finding that Plaintiff's perception, insight, and judgment were all
14 within normal limits.

15 The opinions of Dr. Winfrey and Dr. Kraft are substantial evidence in
16 support of the ALJ's rejection of Dr. Marks's opinion because those opinions are
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20 ⁶³ *Lester*, 81 F.3d at 830.

21 ⁶⁴ *See Lingenfelter*, 504 F.3d at 1042.

22 ⁶⁵ AR 553.

1 corroborated by independent evidence in the record.⁶⁶ That independent evidence
2 includes unremarkable results on multiple mental status exams.⁶⁷

3 Plaintiff argues the ALJ rejected Dr. Marks's opined limitations because
4 they were based on Plaintiff's self-reports. Indeed, the ALJ noted that instead of
5 basing the limitations on the results of Plaintiff's mental status exam, Dr. Marks's
6 opined limitations appeared to be based exclusively on Plaintiff's self-reports.
7 Plaintiff argues rejection on this basis was improper, noting that the Ninth Circuit
8 has recognized that "Diagnoses [of mental illness] will always depend in part on
9 the patient's self-report, as well as on the clinician's observation of the patient."⁶⁸
10 Plaintiff's argument overlooks that, here, the clinician, Dr. Marks, observed that
11 Plaintiff might have been attempting to present herself in a negative light.
12 Therefore, the ALJ reasonably considered that Dr. Marks' opined limitations were
13 based on Plaintiff's self-reports, the reliability of which even Dr. Marks
14 questioned.⁶⁹

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16 ⁶⁶ *Shalala*, 53 F.3d at 1041.

17 ⁶⁷ See AR 542-43 (mental status exam administered by Dr. Dowell); AR 532 (Plaintiff
18 scored 29/30 on mini-mental status exam administered by Dr. Ruppel).

19 ⁶⁸ *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017).

20 ⁶⁹ See *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) ("If a treating
21 provider's opinions are based "to a large extent" on an applicant's self-reports and
22 not on clinical evidence, and the ALJ finds the applicant not credible, the ALJ may
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1 Plaintiff lastly argues the ALJ cannot properly reject Dr. Marks's opinion
2 simply because it differed from Dr. Dowell's opinion. However, the ALJ did not
3 reject Dr. Marks's opinion only because it differed from Dr. Dowell's. Rather, the
4 significant difference between Dr. Marks's and Dr. Dowell's opinions merely
5 bolstered the ALJ's decision to reject Dr. Marks's opinion. The ALJ's rejection of
6 Dr. Marks's opinion was based primarily on the inconsistencies between
7 Dr. Marks's evaluation of the Plaintiff and her opinions concerning the Plaintiff's
8 limitations, as well as the fact that Dr. Marks's opined limitations seemed
9 primarily based on Plaintiff's endorsement of symptoms. These were specific and
10 legitimate reasons to reject Dr. Marks's opinion, and they are supported by
11 substantial evidence.

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17 discount the treating provider's opinion.""). Dr. Marks was not the only medical
18 provider to note that Plaintiff was attempting to present herself in a negative light.
19 Dr. Ruppel noted that, during a physical examination, Plaintiff did not appear to
20 be giving full effort. AR 533. In another instance, Plaintiff admittedly gave false
21 information that she was experiencing suicidal ideation and had overdosed on pills
22 in an attempt to be treated faster at the emergency room for an upset stomach.
23 AR 444. The ALJ noted both instances. AR 22.

1 4. Dr. Smiley

2 Dr. Smiley reviewed the medical evidence of record.⁷⁰ Based on his review of
3 the records and, as relevant here, Dr. Smiley testified that Plaintiff had low back
4 pain, migraine headaches for which she takes medication, and fibromyalgia for
5 which she takes medication.⁷¹ Based on these physical limitations, Dr. Smiley
6 opined that Plaintiff could perform light work.⁷² Dr. Smiley opined that Plaintiff
7 should not work on ropes, ladders, or scaffolds, could never crawl, could not be
8 around unprotected heights or hazardous machinery, and should not be exposed to
9 concentrated respiratory irritants.⁷³ At the video hearing, Plaintiff's counsel and
10 Dr. Smiley had the following exchange:⁷⁴

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12 Plaintiff's Counsel: At 14F, her treating provider had also given the
13 opinion for light work, but noted only being able to do part-time work,
14 limited to 20 hours, again, noting chronic pain but also mental health
15 symptoms. So, you know, he doesn't necessarily rate it out there. But
as far as the migraines and the chronic pain syndrome or
fibromyalgia, would it be reasonable that she would have some missed
days of work due to those?

16 Dr. Smiley: Yes.

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18 ⁷⁰ AR 48-53.

19 ⁷¹ AR 50.

20 ⁷² AR 51.

21 ⁷³ AR 51-52.

22 ⁷⁴ AR 52.

1 Plaintiff's Counsel: Okay. And I know at 7F they said the migraines
2 are weekly or monthly. Doesn't say how many times, but if we were to
3 say it would be reasonable to have two unscheduled absences per
4 month?

5 Dr. Smiley: I think that's reasonable.

6 The ALJ gave great weight to Dr. Smiley's overall opinion but discounted his
7 opinion that two absences a month would be reasonable because 1) it is contrary to
8 the mild-to-moderate limitations he had earlier opined to, 2) it is unsupported by
9 the longitudinal medical record which lacks significant objective findings, and 3)
10 Dr. Smiley offered no basis to explain why two absences per month, as opposed to
11 some other number, was reasonable.

12 Dr. Smiley's opinion is not directly contradicted by other medical
13 professionals. Dr. Kraft and other psychologists opined that Plaintiff could work a
14 regular schedule without interruption from psychological symptoms, but they did
15 not offer opinions regarding the effect of Plaintiff's physical symptoms on her
16 ability to work without absence. Because Dr. Smiley's opinion is not contradicted
17 by another physician, the ALJ must provide clear and convincing reasons to reject
18 it.⁷⁵

19 The first reason provided by the ALJ is that Dr. Smiley's opinion contradicts
20 the mild-to-moderate limitations that he had earlier endorsed. Dr. Smiley assessed
21 some postural limitations, including that Plaintiff should not be on ropes or

22 ⁷⁵ *Lester*, 81 F.3d at 830.

scaffolds, and some environmental limitations, including that she should not be on unprotected heights or hazardous machinery and she should not be exposed to respiratory irritants. While these limitations might be properly categorized as mild-to-moderate, they are not inherently inconsistent with absences due to migraines. Therefore, these mild-to-moderate limitations, standing alone, do not provide a clear and convincing reason to reject Dr. Smiley's opinion.

However, the second and third reasons provided by the ALJ do provide clear and convincing reasons to reject Dr. Smiley's opinion: the ALJ found Dr. Smiley's opinion was inconsistent with the longitudinal record and lacked explanation. A medical opinion may be discounted if it is inadequately supported by medical findings and observations.⁷⁶ Whether a medical opinion is consistent with the longitudinal record is a factor for the ALJ to consider.⁷⁷

Here, the ALJ noted "the claimant's intermittent treatment and minimal objective findings do not support a conclusion effectively rendering her incapable of sustaining full-time work."⁷⁸ The underlying medical record demonstrates Plaintiff

⁷⁶ *Berryhill*, 869 F.3d at 1049; *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *Garrison*, 759 F.3d at 1014.

⁷⁷ *See Lingenfelter*, 504 F.3d at 1042 (recognizing that the ALJ is to consider the consistency of the medical opinion with the record as a whole).

⁷⁸ AR 23.

1 presented for treatment for migraines or headaches on only two occasions since her
2 amended alleged onset date. Plaintiff presented for treatment for a migraine on
3 February 9, 2017; however, she was not at that time taking the prophylactic
4 medicine that had been effective for controlling her migraines in the past.⁷⁹
5 Multiple treatment notes demonstrate Plaintiff went on and off the prescribed
6 prophylaxis migraine medication.⁸⁰ Even so, after February 9, 2017, Plaintiff did
7 not again seek immediate medical care for a headache until October 18, 2018.⁸¹
8 Elsewhere in the opinion, the ALJ noted that Plaintiff had very infrequently
9 sought emergency treatment even though she frequently stopped taking her
10 prophylaxis prescription.⁸² Indeed, treatment notes during both a period in which
11 Plaintiff was taking her prophylaxis medication and a period in which she was not
12 describe her migraines as “stable.”⁸³ The longitudinal record, therefore, supports
13 that Plaintiff’s migraines are generally controlled, especially when Plaintiff takes
14 her prophylaxis prescription. That the longitudinal medical record was inconsistent
15 with Dr. Smiley’s opinion was a clear and convincing reason to discount the
16 opinion.

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18 ⁷⁹ AR 537-38.

19 ⁸⁰ See AR 585, 587.

20 ⁸¹ AR 673.

21 ⁸² AR 22.

22 ⁸³ AR 578, 582.

1 Relatedly, the lack of explanation surrounding Dr. Smiley's opinion was also
2 a clear and convincing reason to reject it.⁸⁴ An ALJ may permissibly reject opinions
3 that do not offer any explanation for their limitations.⁸⁵ Here, Dr. Smiley was
4 asked simply whether two absences a month was reasonable—he was not asked to
5 explain why. Plaintiff argues Dr. Smiley's opinion was premised on a January 14,
6 2017 evaluation of Plaintiff by Dr. Ruppel (in which Dr. Ruppel simply noted
7 Plaintiff reported migraines) and clinic notes from February 9, 2017 by Josue
8 Reyes (one of two instances post-onset date in which Plaintiff sought emergency
9 treatment for a migraine or headache). Notable here, however, is that Plaintiff's
10 counsel—not Dr. Smiley—referenced the examination by Dr. Ruppel and the notes
11 from Josue Reyes. Dr. Smiley did not explain what, if anything, from those records
12 or other records informed his opinion that two absences a month was reasonable
13

14 ⁸⁴ See *Lingenfelter*, 504 F.3d at 1042 (recognizing that a medical opinion is
15 evaluated as to the amount of relevant evidence that supports the opinion, the
16 quality of the explanation provided in the opinion, and the consistency of the
17 medical opinion with the record as a whole; *Orn v. Astrue*, 495 F.3d 625, 631
18 (9th Cir. 2007) (same); *Coaty v. Colvin*, 673 Fed. Appx. 787, 788 (9th Cir. 2017)
19 (affirming ALJ's determination that medical opinion was speculative).

20 ⁸⁵ *Bray*, 554 F.3d at 1228 (recognizing that a medical opinion may be rejected if it is
21 conclusory or inadequately supported); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir.
22 1996).
23

1 for Plaintiff. While Dr. Smiley's opinion is premised on the occurrence of weekly or
2 monthly migraines (as Plaintiff reported to Dr. Ruppel), the occurrence of a
3 migraine does not itself provide a sufficient basis for opining as to the frequency of
4 work absences. Occurrence does not address the severity of the migraine or its
5 impact on the functioning of the particular individual. Plaintiff's counsel did not
6 ask—and Dr. Smiley did not offer—an explanation (i.e., regarding severity and
7 duration) as to why Plaintiff's migraines were of the type to require two absences
8 from work each month. In the absence of such explanation, the ALJ was not
9 obligated to credit the opinion.⁸⁶ Plaintiff has not established the ALJ erred by
10 rejecting Dr. Smiley's opinion.

11 5. Dr. Kraft

12 Dr. Kraft reviewed the medical evidence of record on June 1, 2017. Dr. Kraft
13 noted Plaintiff's diagnoses of moderate recurrent Major Depressive Disorder and
14 Generalized Anxiety Disorder.⁸⁷ Dr. Kraft opined that Plaintiff was not
15 significantly limited in the following: understanding; memory; ability to carry out
16 simple instructions; ability to carry out detailed instructions; ability to perform
17 activities within a schedule, maintain regular attendance, and be punctual within
18 customary tolerances; ability to sustain an ordinary routine without special
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20
21 ⁸⁶ *Bray*, 554 F.3d at 1228.

22 ⁸⁷ AR 138, 158.
23

1 supervision; and the ability to make simple, work-related decisions.⁸⁸ Dr. Kraft
2 opined Plaintiff was moderately limited in the following: the ability to maintain
3 attention and concentration for extended periods; the ability to work in
4 coordination with or in proximity to others without being distracted by them; and
5 the ability to complete a normal workday and work week without interruption from
6 psychologically based symptoms and to perform at a consistent pace without an
7 unreasonable number and length of rest periods.⁸⁹ Dr. Kraft elaborated on these
8 findings by stating that Plaintiff is “Capable of the completion of simple and
9 complex tasks with some waxing and waning of [concentration, persistence, and
10 pace] due to anxiety symptoms. Capable of performing simple and complex tasks
11 within her physical limits at a productive rate with reasonable rest breaks the
12 majority of the time.”⁹⁰

13 Plaintiff argues the ALJ erred by failing to consider whether she can
14 maintain regular, continuous employment despite the need for breaks due to
15 anxiety symptoms. Plaintiff asserts that she needs 30-minute breaks. She states
16 this precludes continuous employment because the vocational expert testified that
17 one to two unscheduled breaks per day to leave the workstation for 30 minutes due
18 to mental health symptoms precludes competitive employment.

20 ⁸⁸ AR 142.

21 ⁸⁹ AR 142-43, 161-62.

22 ⁹⁰ AR 143, 162.

1 Plaintiff's argument rests on a faulty premise. Neither Dr. Kraft nor any
2 other medical provider opined that Plaintiff needed 30-minute breaks. Instead,
3 Dr. Kraft opined simply that Plaintiff needed *reasonable* rest breaks. Moreover,
4 contrary to Plaintiff's argument, the ALJ incorporated Dr. Kraft's opinion into
5 Plaintiff's RFC.⁹¹ In relevant part, the ALJ concluded Plaintiff had the RFC to
6 maintain concentration, persistence, and pace for two-hour intervals with regularly
7 scheduled breaks.⁹² Plaintiff fails to establish error with respect to the ALJ's
8 consideration of Dr. Kraft's opinion.

9 6. Drs. Bailey and Hander

10 Although not argued by Plaintiff, this Court must address the fact that the
11 ALJ did not mention the January 2014 reviewing medical opinions of Dr. Bailey
12 and Dr. Hander. While the ALJ should have addressed, if only briefly, these
13 opinions, any error in not weighing these medical opinions is harmless. First,
14 Dr. Bailey's and Dr. Hander's opinions were issued 19 months before the relevant
15 disability period. Like the ALJ found as to Dr. Fackenthall's December 2013
16 examining opinion and Dr. Blagov's January 2014 examining opinion, these
17 opinions were too remote in time to be of significant evidentiary value in assessing
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19
20 ⁹¹ See *Rounds*, 807 F.3d at 1006 (focusing on whether the crafted RFC rationally
21 incorporates the evidentiarily supported opined limitations).

22 ⁹² AR 20.
23

1 Plaintiff's functioning during the relevant disability period.⁹³ Second, the opined
 2 limitations by Dr. Bailey and Dr. Hander were consistent with the RFC. Dr. Bailey
 3 opined that Plaintiff could perform and sustain simple repetitive tasks with
 4 infrequent, superficial contact with the public. The RFC restricts Plaintiff to simple
 5 repetitive tasks and instructions, brief interaction with the public, and superficial
 6 interaction with coworkers. Dr. Hander opined that Plaintiff could do light work,
 7 with frequent climbing of ramps and stairs and stooping, occasional climbing of
 8 ladders, ropes, and scaffolds, and environmental limitations. The RFC was
 9 consistent with, or more restrictive than, Dr. Hander's opined limits. Thus, the
 10 ALJ did not consequentially err by failing to explicitly weigh the opinions of
 11 Dr. Bailey and Dr. Hander.⁹⁴

12 **B. Step Three (Listings): Plaintiff fails to establish consequential error.**

13 At step three, the ALJ must determine if a claimant's impairments meet or
 14 equal a listed impairment.⁹⁵ To meet a listed impairment, the claimant has the
 15 burden of establishing that she meets each characteristic of a listed impairment
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19 ⁹³ AR 25.

20 ⁹⁴ *See Rounds*, 807 F.3d at 1006 (focusing on whether the crafted RFC rationally
 21 incorporates the evidentiarily supported opined limitations).

22 ⁹⁵ 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4).
 23

1 relevant to her claim.⁹⁶ A claimant who does not meet the listing criteria may still
 2 be considered disabled at step three if her impairment or impairments medically
 3 equal a listed impairment.¹⁰⁷ Medical equivalence can be established three ways:

- 4 1) If an individual has an impairment that is described in the listings,
 5 but either:
 - 6 a. the individual does not exhibit one or more of the findings
 specified in the particular listing, or
 - 7 b. the individual exhibits all of the findings, but one or more
 of the findings is not as severe as specified in the particular
 8 listing,

9 then the impairment is medically equivalent to that listing if there are
 10 other findings related to the impairment that are at least of equal
 11 medical significance to the required criteria.

- 12 2) If an individual has an impairment(s) that is not described in the
 Listing of Impairments, findings related to the individual's actual
 13 impairment are compared with those for closely analogous listed
 14 impairments. If the findings related to the individual's actual
 15 impairment(s) are at least of equal medical significance to those of a
 16 listed impairment, the impairment(s) is medically equivalent to the
 17 analogous listing.

- 18 3) If an individual has a combination of impairments, no one of which
 19 meets a listing described in the Listing of Impairments, findings
 20 related to the individual's actual impairments are compared with
 21 those for closely analogous listed impairments. If the findings
 22 related to the individual's actual impairments are at least of equal
 23 medical significance to those of a listed impairment, the
 combination of impairments is medically equivalent to that
 listing.⁹⁷

20 ⁹⁶ *Id.* §§ 404.1525(d), 416.925(d); *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir.
 21 2005).

22 ⁹⁷ 20 C.F.R. §§ 404.1526(b), 416.926(b).

1 “In evaluating a claimant with more than one impairment, the
 2 Commissioner must consider ‘whether *the combination* of [the claimant’s]
 3 impairments is medically equal to” the relevant listing.⁹⁸ “The claimant’s illnesses
 4 ‘must be considered in combination and must not be fragmentized in evaluating
 5 their effects.’”⁹⁹ “In determining whether the claimant’s combination of
 6 impairments equals a particular listing, the Commissioner must consider whether
 7 h[er] ‘symptoms, signs, and laboratory findings are at least equal in severity to the
 8 listed criteria.’”¹⁰⁰

9 The ALJ must consider the relevant evidence to determine whether a
 10 claimant’s impairments meet or equal one of the specified impairments set forth in
 11 the listings.¹⁰¹ Generally, a “boilerplate finding is insufficient to support a
 12 conclusion that a claimant’s impairment does not [meet or equal
 13 a listing].”¹⁰² However, the ALJ need not recite the reasons for her step-three
 14 determination under the listings portion of the decision so long as

16 ⁹⁸ *Lester*, 81 F.3d at 829 (citing 20 C.F.R. § 404.1520(d)) (emphasis added).

17 ⁹⁹ *Id.* (citing *Beecher v. Heckler*, 756 F.2d 693, 694–95 (9th Cir. 1985)).

18 ¹⁰⁰ *Lester*, 81 F.3d at 829 (citing 20 C.F.R. § 404.1529(d)(3)).

19 ¹⁰¹ *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001); 20 C.F.R. § 416.920(a)(4)(iii).

20 ¹⁰² *Lewis*, 236 F.3d at 512; *see also Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir.
 21 1990) (noting that the ALJ’s unexplained finding at step three was reversible
 22 error).

1 the relevant evidence and underlying findings are discussed in the ALJ's
 2 decision.¹⁰³ The key is whether this Court can conduct a meaningful review of the
 3 ALJ's decision.¹⁰⁴

4 Here, the ALJ found:

5 The claimant's physical impairments do not meet or medically equal
 6 any listing, either singly or in combination.
 7 In accordance with SSR 02-1p, the undersigned has also considered
 8 whether the claimant's morbid obesity meets or equals any listing on
 9 its own, as well as whether it, in combination with the claimant's
 other severe impairment, equals a listing. The undersigned has also
 carefully considered the claimant's obesity in determining her
 residual functional capacity below.

10 The ALJ then found, "The severity of the claimant's mental impairments,
 11 considered singly and in combination, do not meet or medically equal the criteria of
 12 listings 12.04, 12.06, and 12.08."¹⁰⁵ Over several paragraphs, the ALJ explained
 13 her conclusions with respect to Plaintiff's mental impairments, ultimately finding
 14 that "the claimant's mental impairments d[id] not cause" at least two marked
 15 limitations or one extreme limitation in the paragraph B criteria.¹⁰⁶

16 Plaintiff contends the ALJ erred at step three of the sequential analysis by
 17 1) failing to address any of Plaintiff's physical impairments, symptoms, or

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 19 ¹⁰³ *Lewis*, 236 F.3d at 513.

20 ¹⁰⁴ *See Brown-Hunter v. Colvin*, 806 F.3d 487, 489 (9th Cir. 2015).

21 ¹⁰⁵ AR 19.

22 ¹⁰⁶ AR 19-20.

1 limitations; 2) failing to consider Listing 14.09D (inflammatory arthritis); and
2 3) failing to consider fibromyalgia in conjunction with other impairments as
3 required by SSR 12-2p.

4 Because the ALJ did not expressly discuss Plaintiff's migraines and
5 fibromyalgia in the listings section, it is difficult to discern whether the ALJ
6 evaluated the combined effect of Plaintiff's physical and mental impairments when
7 determining whether Plaintiff met or medically equaled a listing. A fair reading of
8 the decision is that the ALJ separately analyzed Plaintiff's physical impairments
9 and mental impairments. This runs counter to the instruction that impairments
10 should not be fragmented when evaluating their effects. Instead, *all* of Plaintiff's
11 impairments—physical and mental—should have been evaluated together when
12 determining whether Plaintiff met or equaled a listing.¹⁰⁷ This means the ALJ
13 should have evaluated the symptoms, signs, and laboratory findings from
14 Plaintiff's physical *and* mental impairments to determine whether, taken together,
15 those symptoms, signs, and findings were at least equal in severity to a claimed
16 listing. This is particularly important when a claimant has a mental disorder in
17 addition to a physical disorder that causes acute or chronic pain, as the effects of
18 pain are not always easily separated from the effects of a mental disorder.¹⁰⁸ The
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20 ¹⁰⁷ See *Celaya v. Halter*, 332 F.3d 1177, 1182 (9th Cir. 2003).

21 ¹⁰⁸ See *Lester*, 81 F.3d at 829-30 (noting that, for claimant with chronic pain
22 syndrome and affective disorder, the consequences of the physical and mental
23

1 ALJ erred to the extent she failed to consider the combined effects of Plaintiff's
2 impairments. Nonetheless, any error that may have occurred here was harmless
3 because, as explained below, Plaintiff has not demonstrated that she meets or
4 equals Listing 14.09D or another listing.

5 1. Listing 14.09D

6 Because fibromyalgia is not a listed impairment, an ALJ looks to Listing
7 14.09D (inflammatory arthritis). Listing 14.09D requires:

8 Repeated manifestations of inflammatory arthritis, with at least two
9 of the constitutional symptoms or signs (severe fatigue, fever, malaise,
or involuntary weight loss) and one of the following at a marked level:

- 10 1. Limitation of activities of daily living.
11 2. Limitation in maintaining social functioning.
12 3. Limitation in completing tasks in a timely manner due to
deficiencies in concentration, persistence, or pace.

13 Plaintiff urges this Court to reverse because the ALJ did not expressly
14 discuss Listing 14.09D or Plaintiff's physical impairments in relation to Listing
15 14.09D. However, "[a]n ALJ is not required to discuss the combined effects of a
16 claimant's impairments or compare them to any listing in an equivalency
17 determination, unless the claimant presents evidence in an effort to establish
18

19
20 impairments were inextricably linked and the Commissioner "erred as a matter of
21 law in isolating the effects of [the claimant's] physical impairment from the effects
22 of his mental impairment").
23

1 equivalence.”¹⁰⁹ At the video hearing, Plaintiff did not offer a theory to the ALJ
2 regarding how her impairments equal Listing 14.09D. Indeed, Listing 14.09D was
3 not mentioned at all during the hearing. More important, Plaintiff fails to explain
4 to this Court how her impairments equal Listing 14.09D. Rather, she asserts
5 simply that, “when the record is properly considered in conjunction with the
6 improperly rejected medical opinions and combined effects of her impairments, she
7 meets or equals Listings 11.02, 12.04, 12.06, 12.08, 12.15, and 14.09D, singly or in
8 combination, as a result of fibromyalgia pain, Dr. Mark’s findings, multiple
9 migraines per month limiting her to bedrest despite adherence to prescribed
10 medication, and frequent exhibitions of tearfulness, anxiety, and nervous/fidgety
11 behavior seen in the record.”¹¹⁰ Plaintiff’s cursory assertion, however, is not
12 sufficient to support Plaintiff’s argument that she meets the multiple claimed
13 listings, all of which are “purposefully set at a high level of severity because ‘the
14 listings were designed to operate as a presumption of disability that makes further
15 inquiry unnecessary.’”¹¹¹ To the extent Plaintiff’s argument relies on allegations
16 that Dr. Marks’s medical opinion was improperly rejected by the ALJ, this Court
17 rejects that argument for the reasons explained above.

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19 ¹⁰⁹ *Barnhart*, 400 F.3d at 683.

20 ¹¹⁰ ECF No. 16.

21 ¹¹¹ *Kennedy v. Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v.*
22 *Zebley*, 493 U.S. 521, 532 (1990)).
23

Moreover, Plaintiff—not the Court—must flesh out and support her arguments with law and facts.¹¹² Plaintiff does not direct this Court to evidence in the record of the relevant and required constitutional symptoms of Listing 14.09D or their medical equivalents, nor does she explain why she has at least one marked limitation in one of the three enumerated categories.

In any case, substantial evidence—evidence cited by the ALJ, albeit related to other listings or the evaluation of paragraph B criteria—supports that Plaintiff is not markedly limited in her activities of daily living, social functioning, or concentration, persistence, or pace and, therefore, does not equal Listing 14.09D.

With respect to activities of daily living, the ALJ noted that Plaintiff can walk a couple of blocks before needing to rest, takes care of her daughter with the help of her mother, can make easy meals on a daily or weekly basis, and can do the laundry twice a week.¹¹³ The ALJ also noted that Plaintiff can drive herself,¹¹⁴ pay

¹¹² See *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 930 (9th Cir. 2003) (“We require contentions to be accompanied by reasons.”); *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (“[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in a most skeletal way, leaving the court to . . . put flesh on its bones.”).

¹¹³ AR 21.

¹¹⁴ AR 19.

1 bills, count change, handle a savings account, and use a checkbook.¹¹⁵ The ability
2 to perform these daily activities constitutes substantial evidence that Plaintiff is
3 not markedly limited in her activities of daily living. This conclusion is further
4 supported by additional evidence in the record, although not explicitly mentioned
5 by the ALJ,¹¹⁶ that Plaintiff can go to the store to shop for a few items for up to 30
6 minutes¹¹⁷ and can bathe and groom herself without assistance.¹¹⁸

7 With respect to social functioning, the ALJ noted that Plaintiff does not like
8 large crowds but interacted well during the relevant medical and psychological
9 evaluations and self-reported that she got along “fine” with authority figures and
10 has never had employment issues related to getting along with others.¹¹⁹ The ALJ
11 also discussed opinions from psychologists Dr. Winfrey, Dr. Gilbert, and Dr. Kraft,
12 who all concluded that Plaintiff was, at most, moderately limited in her ability to
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15 ¹¹⁵ AR 20.

16 ¹¹⁶ *See Fenton v. Colvin*, No. 6:14–00350–SI, 2015 WL 3464072, at *1 (D. Or. June
17 1, 2015) (“The Court is not permitted to affirm the Commissioner on a ground upon
18 which the Commissioner did not rely, but the Court is permitted to consider
19 additional support for a ground on which the ALJ relied.”).

20 ¹¹⁷ AR 156, 335, 352.

21 ¹¹⁸ AR 351.

22 ¹¹⁹ AR 19.

1 interact with others and adapt or manage herself.¹²⁰ The ALJ noted those opinions
2 were based on objective evidence in the underlying record.

3 With respect to the ability to concentrate, persist, or maintain pace, the ALJ
4 again discussed the opinions of Dr. Winfrey, Dr. Gilbert, and Dr. Kraft. All three
5 doctors found Plaintiff was, at most, moderately limited in her ability to
6 concentrate, persist, or maintain pace.¹²¹ The ALJ again noted these conclusions
7 were based on objective evidence in the underlying record. Related to other listings,
8 the ALJ also discussed the consultative evaluation by Dr. Ruppel in which Plaintiff
9 could perform serial sevens and could spell “world” forward and backward. The
10 ALJ also noted results from the examinations performed by Dr. Dowell and
11 Dr. Marks, including that Plaintiff could perform basic math and could manage a
12 savings account and checkbook.¹²²

13 In short, while Plaintiff was diagnosed with fibromyalgia and migraines,
14 those diagnoses do not alone provide a basis to conclude she equals Listing
15 14.09D.¹²³ Substantial evidence in the record supports the ALJ’s conclusion that
16 Plaintiff does not equal Listing 14.09D.

19 ¹²⁰ AR 55-56, 105, 138.

20 ¹²¹ AR 55-56, 105, 138.

21 ¹²² AR 19.

22 ¹²³ 20 C.F.R. §§ 404.1525(d), 416.925(d).

1 2. Other Listings

2 Plaintiff also claims she meets or equals Listings 11.02 (epilepsy), 12.04
3 (depressive, bipolar, and related disorders), 12.06 (anxiety and obsessive-
4 compulsive disorders), 12.08 (personality and impulse-control disorders), and 12.15
5 (trauma-related and stressor-related disorders), because of her fibromyalgia pain,
6 Dr. Marks's opined limitations, multiple migraines per month limiting her to
7 bedrest despite adherence to prescribed medication, and frequent exhibitions of
8 tearfulness, anxiety, and nervous/fidgety behavior. This Court has already
9 determined the ALJ did not err in rejecting Dr. Marks's opinion. Moreover, the ALJ
10 considered Listings 12.04, 12.06, and 12.08. The ALJ found Plaintiff did not satisfy
11 the paragraph B criteria for these listings because she had only mild-to-moderate
12 limitations. The ALJ supported her decision with reference to the results of
13 consultative examinations conducted by Dr. Ruppel and Dr. Marks, as well as the
14 psychiatric evaluation conducted by Dr. Dowell.¹²⁴ Reliance on those opinions,
15 which are corroborated by independent evidence in the medical record, was not
16 error. Furthermore, as noted above, Plaintiff makes only a perfunctory effort to
17 argue to this Court why she meets Listings 12.04, 12.06, and 12.08. This minimal
18 effort is insufficient to present this Court with a plausible theory that incorporates
19 law and facts into an explanation of why Plaintiff meets the claimed listings. This
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¹²⁴ AR 19.

1 Court cannot make the arguments for Plaintiff. Plaintiff has likewise failed to put
 2 flesh on the bones of her argument that she meets Listings 11.02 and 12.15.¹²⁵

3 Plaintiff fails to establish the ALJ erred in finding she does not meet or
 4 equal a listed impairment.

5 **C. Step Five: Plaintiff fails to establish error.**

6 Plaintiff argues the ALJ erred at step five because the vocational expert's
 7 testimony was based on an incomplete hypothetical that failed to include the
 8 opined absenteeism and unproductivity limitations. Plaintiff's argument is based
 9 entirely on her initial argument that the ALJ erred in considering the medical-
 10 opinion evidence. For the above-explained reasons, the ALJ's consideration of the
 11 medical-opinion evidence was legally sufficient and supported by substantial
 12 evidence. The ALJ did not err in assessing the RFC or finding Plaintiff capable of
 13 performing work existing in the national economy.¹²⁶

14 **V. Conclusion**

15 Accordingly, **IT IS HEREBY ORDERED:**

- 16 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

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 19 ¹²⁵ See *McPherson*, 125 F.3d at 995-96.

20 ¹²⁶ See *Magallanes v. Bowen*, 881 F.2d 747, 756–57 (9th Cir. 1989) (holding it is
 21 proper for the ALJ to limit a hypothetical to those restrictions supported by
 22 substantial evidence in the record).

1 2. The Commissioner's Motion for Summary Judgment, **ECF No. 17**, is
2 **GRANTED.**

3 3. The Clerk's Office shall enter **JUDGMENT** in favor of the
4 Commissioner.

5 4. The case shall be **CLOSED.**

6 **IT IS SO ORDERED.** The Clerk's Office is directed to file this Order and
7 provide copies to all counsel.

8 **DATED** this 11th day of June 2021.

9
10 _____
 s/Edward F. Shea
 EDWARD F. SHEA
11 Senior United States District Judge